APPENDIX

Civil Rights Law

40-b. Wrongful refusal of admission to and ejection from places of public entertainment and amusement.

No person, agency, bureau, corporation, or association, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public entertainment and amusement as hereinafter defined shall refuse to admit to any public performance held at such place any person over the age of twenty-one years who presents a ticket of admission to the performance a reasonable time before the commencement thereof, or shall eject or demand the departure of any such person from such place during the course of the performance, whether or not accompanied by an offer to refund the purchase price or value of the ticket of admission presented by such person; but nothing in this section contained shall be construed to prevent the refusal of admission to or the objection of any person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace.

The places of public entertainment and amusement within the meaning of this section shall be legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses. Added L. 1941, c. 893.

[Opinions of Supreme Court Follow]

Opinion of Supreme Court, Schenectady County, New York

LAYDEN, *J.*:

The plaintiff herein as the lawful holder of a ticket of admission to the 46th Street Theatre, on the evening of May 27th, 1941, presented his ticket and sought admission to the theatre, where there was being presented at that time the play, "Panama Hattie." It is undisputed that his conduct and speech were not abusive or offensive, and that he was not engaged in any activity tending to a breach of the peace. Admission to the theatre was refused by the agents of the defendants and an offer was made to refund the purchase price of the ticket, this offer being declined by the plaintiff.

Because of the foregoing, the plaintiff seeks to recover the penalty prescribed in Section 41 of the Civil Rights Law of the State of New York in the sum of Five Hundred dollars, basing his right to recover upon the contention that the provisions of Section 40-b of the Civil Rights Law have been violated by the defendants.

The facts are not disputed, but the defendants insist that there can be no recovery herein because of the unconstitutionality of Section 40-b of the Civil Rights Law. That Section reads as follows:

"No person, agency, bureau, corporation or association, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public entertainment and amusement as hereinafter defined, shall refuse to admit to any public performance held at such place, any person over the age of twenty-one years who presents a ticket of admission to the performance, a reasonable time before the commencement thereof, or shall eject or demand the departure of any such person from such place

during the course of the performance, whether or not accompanied by an offer to refund the purchase price or value of the ticket of admission presented by such person; but nothing in this section contained shall be construed to prevent the refusal of admission to or the ejection of any person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace.

The places of public entertainment and amusement within the meaning of this action shall be legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

The defendants first contend that the foregoing is unconstitutional in that it constitutes a deprivation of defendants' property without due process of law. In support of this proposition, they cite the case of Woollcott *v.* Shubert, 217 N. Y. 212, and Tyson *v.* Banton, 273 U. S. 429. In both of these cases, however, the Courts were dealing with rights as they existed at the common law. The rights which are now to be determined are those created by a statutory provision and it would seem that in connection herewith, the single question to be determined is whether there is here a valid exercise of the police power.

To my mind this question seems to have been completely answered in Western Turf Association *v.* Greenberg, 204 U. S. 359, wherein the following appears:

"The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations or associations conducting places of public amusement or entertainment. Of still less merit is the suggestion that the statute abridges the rights and

privileges of citizens; for a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a state.

The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law; for, the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons. Northwestern Life Insurance Co. *v.* Riggs, 203 U. S. 243. Does the statute deprive the defendant of any property right without due process of law? We answer this question in the negative. Decisions of this court, familiar to all, and which need not be cited, recognize the possession by each state, of powers never surrendered to the General Government; which powers the state except as restrained by its own constitution of the Constitution of the United States, may exert not only for the public health, the public morals and the public safety, but for the general or common good, for the well being, comfort and good order of the people. The enactments of a state, when exerting its power for such purposes, must be respected by this court, if they do not violate rights granted or secured by the Supreme Law of the land. In view of these settled principles, the defendant is not justified in invoking the Constitution of the United States. The statute is only a regulation of places of public entertainment and amusement upon terms of equal and exact justice to every one holding a ticket of admission, and who is not at the time under the influence of liquor, or boisterous in conduct, or of lewd and immoral character. In short, as applied to the plaintiff in error, it is only a regulation compelling it to perform its own contract as evidenced

by tickets of admission issued and sold to parties wishing to attend its race-course. Such a regulation, in itself just, is likewise promotive of peace and good order among those who attend places of public entertainment or amusement. It is neither an arbitrary exertion of the state's inherent or governmental power, nor a violation of any right secured by the Constitution of the United States. The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest that the state may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute. That such a regulation violates any right of property secured by the Constitution of the United States cannot, for a moment, be admitted. The case requires nothing further to be said. The judgment is affirmed."

This decision also seems to dispose of the defendants' contention that Section 40-b of the Civil Rights Law is unconstitutional in that it constitutes a restraint of defendants' free right to contract.

Only recently it was determined in City of Albany v. Anthony, 262 App. Div. 401, that both liberty and property are subject to the police power of the state under which new burdens may be imposed on property and new restrictions placed on its use when the public welfare demands it.

It is true that there is one essential point of difference between the statute which was passed upon in Western Turf Association *v.* Greenberg, and the one now under consideration. The California Statute under consideration in the United States Supreme Court case provided that it was unlawful to refuse admission to,

"any opera house, theatre, melodeon, museum, circus caravan, race-course, fair, or other place of public amusement or entertainment, to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place; provided, that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement."

That statute included, "other place of public amusement or entertainment." The statute under consideration here expressly limits its application to "legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

Because of the failure of the New York Statute to include within its provisions moving picture theatres, the defendants claim that it constitutes a denial to them of the equal protection of the laws.

There remains then for determination whether or not the classification adopted by the Legislature is reasonable, not arbitrary and rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (See, Merchants Refrigerating Co. *v.* Taylor, 275 N. Y. 113.)

While legitimate theatres and moving picture theatres are both places of amusement, still there exists between the two, essential differences, and I am unable to say that the classification adopted by the Legislature is arbitrary, capricious or unreasonable.

Judgment is, therefore, directed in favor of the plaintiff for the sum of Five hundred dollars.

Opinion of Supreme Court, State of New York, Appellate Division, Third Department

HILL, *P. J.*:

Respondent has recovered a judgment against appellants for $500 penalty fixed by Section 41 of the Civil Rights Law. The facts are not in dispute. Respondent purchased a ticket of admission to the 46th Street Theatre in New York City for the evening performance of May 27, 1941. For no reason assigned, when he sought to enter the theatre admission was refused him.

Section 40-b of the Civil Rights Law enacts that persons or corporations conducting a place of entertainment and amusement of the character later defined, are forbidden to "refuse to admit to any public performance held at such place any person over the age of twenty-one years who presents a ticket of admission to the performance a reasonable time before the commencement thereof, * * *; but nothing in this section contained shall be construed to prevent the refusal of admission to or the ejection of any person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace. The places of public entertainment and amusement within the meaning of this section shall be legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

Appellants attack the constitutionality of the statute, urging that it violates their rights to equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States, and also that it is not a proper exercise of police power, and amounts to the taking of

property without due process, and base an assertion of discrimination because motion picture theatres are not included in the statute.

Under the common law, these appellants would have the right to control their theatre to the same extent as any other private business; they would have the right to decide who to admit (Woollcott *v.* Shubert, 217 N. Y. 212, 216). Earlier similar authorities are, Collister *v.* Hayman (183 N. Y. 250), which dealt with the right to exclude the holder of a ticket purchased from a sidewalk ticket speculator, and People ex rel. Burnham *v.* Flynn (189 N. Y. 180), which determined that a theatre could exclude the dramatic critic Metcalfe. For respondent to sustain his recovery, he must show that the common law rule has been abrogated, either by constitutional provision or a legislative enactment not violative of the Constitution. Munn *v.* Illinois (94 U. S. 113) was a pioneer decision in this country as to certain principles here involved, although the facts differed. It is stated in that opinion "But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law * * *. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself as a rule of conduct may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations" (p. 134). People *v.* King (110 N. Y. 418), dealt with the exclusion of three colored men from a skating rink at Norwich, N. Y. A section of the New York State Penal Code made it a misdemeanor to exclude any citizen from theatres and other public places because of "race, color or previous condition of servitude." It was there determined that the Common Law rule had been abrogated by the Penal Code, which in turn was constitu-

tional. In Woollcott *v.* Shubert (supra) a dramatic critic had been excluded from the theatre, not because of race, creed or color. Our Court of Appeals decided that the Civil Rights Act as then in force (Laws of 1895, Chap. 1042) prevented the exclusion of any person "upon the ground of race, creed or color" but for no other reason, and that plaintiff could be excluded because of the animosity of the owner of the theatre, engendered by adverse criticism. The present Civil Rights Section 40-b, by its terms gives the right of admission to "any person over the age of twenty-one years, who presents a ticket of admission to the performance a reasonable time before the commencement thereof" and whose conduct is not offensive. It is admitted that plaintiff was of the required age, came at a proper time, and was in no way offensive. In Western Turf Association *v.* Greenberg (204 U. S. 359), a race course held out by the proprietor as a place of public entertainment and amusement was "so far affected with the public interest that the state may, in the interest of good order and fair dealing require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the Statute" (p. 364). The case dealt with a California statute which made it unlawful to refuse admittance to any person over twenty-one years of age who presented a ticket at any opera house, theatre, race course or other named place of public amusement. The question of "race, creed or color" was not involved.

The New York statute is constitutional and sustains plaintiff's right to recover unless the exclusion of motion picture theatres makes it discriminatory. Classifications and exceptions are matters for the legislature, and are declared unconstitutional only where they are arbitrary

and without reason. It was stated upon the argument, and we may take notice that while there are thousands of movie theatres in the state, there are fewer than fifty so-called legitimate theatres, of which these defendants control a majority. A film that is being shown in a movie house is being shown at the same time in hundreds of others. In the legitimate theatre, the actors in person are upon the stage, and the performance which they give is the only one in the city and probably in the state. Plaintiff could see "Panama Hattie" presented by actors in person only at defendants' 46th Street Theatre. "Panama Hattie" in films could be seen in a hundred houses.

When the legislature determined that the common law should be changed as to some places of amusement to make admission mandatory, it could determine the type of amusements to include, and as long as there were grounds and reasons for the classification which was made, the statute is not unconstitutional (Atkins *v.* Hertz, Inc., 261 N. Y. 352; Chamberlain, Inc. *v.* Andrews, 271 N. Y. 1; Woollcott *v.* Shubert, supra).

The judgment should be affirmed.